केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, GST Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

☎: 079-26305065

टेलेफैक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)132/Ahd-South/2018-19 / 10435 to 10439

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-01-2019-20**
दिनाँक Date : **16-04-2019** जारी करने की तारीख Date of Issue 09/05/2019

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **MP/03/AC/Div-III/2018-19** दिनाँक: **23.07.2018** issued by Assistant Commissioner, Div-III, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Third Rock Trips
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

...2...

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः--
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील'** दाखिल करने **के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

This appeal has been filed by M/s Third Rock Trips, C-1/264, Phase-II, GIDC, Vatva, Ahmedabad [hereinafter referred to as "the appellant"] against Order-in-Original No.MP/03/AC/Div-III/2018-19 dated 23.07.2018 [hereinafter referred to as "the impugned order"] passed by the Assistant Commissioner, CGST, Division-III, Ahmedabad Sourth [hereinafter referred to as "the adjudicating authority"].

2. Briefly stated, the fact of the case is that based on an Audit Observation, a show cause notice dated 09.06.2017 was issued to the appellant for recovery of service tax amounting to [i] Rs.1,43,445/-less paid on account of taxable amount received for providing taxable service and [ii] Rs.1,00,556/- less paid on account of amount received as Commission during the period of 2012-13 to 2014-15. Vide impugned order, the adjudicating authority has confirmed the demand with interest and imposed penalty of Rs.2,44,001/- under Section 78 of the Finance Act, 1994 and Rs.10,000/- under Section 77 of the FA, 1994.

3. Being aggrieved, the appellant has filed the instant appeal on the grounds that:

- They had filed a Chartered Accountant Certificate, in which the entire details for financial years were verified and certified; that as per Chartered Accountant certificate, there was no short payment except for a small amount in F Y 2012-13. The adjudicating authority has not considered the said certificate on the ground that it has no relevance. Further, necessary invoices have been submitted which was not considered by him. Therefore, no demand is sustainable on the ground of reconciliation.
- The Commission income is the only income in the business of air travel agents and the Legislature has sought to tax air travel agents on lump-sum basis and such option once exercised, the confirmation of demand on commission income is not sustainable being dehors the provisions of Service Tax Act; that the adjudicating authority has not given independent finding to the submissions made by them with regard to the applicability of Rule 6(7) of ST Rules and decision of Hon'ble Tribunal in this issue.

4. Personal hearing in the matter was held on 05.04.2019. Shri Nirav Shah, Advocate appeared for the same and reiterated the grounds of appeal.

5. I have carefully gone through the fact of the case and submissions made by the appellant in the appeal memorandum as well as at the time of personal hearing. At the outset, I observe that the demands confirmed by the adjudicating authority pertain to the period of 2012-13 to 2014-15 represent in two counts. One is as a result of reconciliation of books of accounts with ST-3 returns which resultant short payment of Rs.1,43,445/- and other is on account of non-payment of service tax amounting to Rs.1,00,556/- against the commission income received.

6. As regards service tax amounting to Rs.1,43,44/- found to be short paid on account of reconciliation of books of accounts with ST-3 return for the disputed period, the appellant has argued that they had submitted Chartered Accounted Certificate before the adjudicating authority which clearly indicates that no such short payment has been taken place during the said periods. However, the adjudicating authority has not considered the said certificate while passing the impugned order. I find that the adjudicating authority has taken note in para 18 of the impugned order regarding the certificate issued by the Chartered Accountant. However, in para 19 of the impugned order, as per contention of the adjudicating authority, I find that he has not find any merit to examine the said certificate on the grounds that the said certificate has no relevance as it cannot be allowed to by-pass the law and to re-assess the claim of abatement and credit taken as it has attained finality. The argument of the adjudicating authority is not tenable and not acceptable as the demand was raised only on the basis of reconciliation of books and accounts with ST-3 return. Therefore, whatever details contended in the Chartered Accountant's certificate needs to be verified with the reconciliation statement prepared by the department and the actual amount short paid is to be determined. In the circumstances, I find merit consideration in the argument of the appellant and the adjudicating authority needs to be verified the matter again with the certificate issued by the Chartered Accountant. Therefore, I remand this issue for fresh consideration. The appellant is all liberty to submit any supporting documents before the adjudicating authority in this regard.

7. As regards the service tax amounting to Rs. 1,00,556/- short paid against commission income received, the appellant has contended that they were paying service tax under Rule 6(7) of Service Tax Rules, 1994 and therefore, the commission income is already tax paid. The adjudicating authority has contended in the impugned order that the Audit officer has detected that the appellant have commission income in their books of accounts on which service tax is payable. I find that the contention of the appellant has not considered and discussed by the adjudicating authority, though they argued before him. The Rule 6(7) of the ST Rules states as under:

> *"The person liable for paying the service tax in relation to the services of booking of tickets for travel by air provided by an air travel agent, shall have the option, to pay an amount calculated at the rate of [0.7] of the basic fare in the case of domestic bookings, and at the rate of [1.4] of the basic fare in the case of international bookings, of passage for travel by air, during any calendar month or quarter, as the case may be, towards the discharge of his service tax liability instead of paying service tax [at the rate of specified in [section 66B] of Chapter V of the Act] and the option, once exercised, shall apply uniformly in respect of all the bookings of passage for travel by air made by him and shall not be changed during a financial year under any circumstances."*

As per Rule supra, once the appellant have opted to pay an amount calculated at the rate of the basic fare towards the discharge of service tax liability, question of making service tax payment at the rate as specified in Section 66B of the FA does not arise. It is the argument of the appellant that they were paying tax under rule

6(7) of the ST Rule. In other words, they have opted at the rate as specified in the said rule. The adjudicating authority has neither considered the submissions made by the appellant in this regard nor verified the factual facts. If the contention of the contention of the appellant found to be in order, they are not liable to pay the tax at the rate specified under Section 66 B of FA. All the above mentioned facts also to be verified by the adjudicating authority afresh and the appellant are directed to furnish all particulars to the adjudicating authority. Therefore, I remand this issue also to the adjudicating authority.

8. In view of above discussion, I allow the appeal by way of remand. The appeal stands disposed of in above terms.

(उमा शंकर)
प्रधान आयुक्त (अपील्स)
Date : .04.2019

Attested

(Mohanan V.V)
Superintendent (Appeal),
Central Tax,Ahmedabad.

By RPAD.
To,
M/s Third Rock Trips,
C-1/264, Phase-II, GIDC, Vatva, Ahmedabad

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central GST, Ahmedabad South.
3. The Assistant Commissioner, System, CGST, Ahmedabad South
4. The Assistant Commissioner, CGST, Dn.III, Ahmedabad South
5. Guard File.